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10 IN THE UNITED STATES DISTRICT COURT

11 FOR THE NORTHERN DISTRICT OF CALIFORNIA

12 SAN FRANCISCO DIVISION

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15 UNITED STATES OF AMERICA,

No. CR 09-00749 RS

16 v. Plaintiff,

17 **ORDER DENYING DEFENDANT'S
MOTIONS (1) TO DISMISS THE
INDICTMENT, (2) TO COMPEL
COMPLIANCE WITH ORDER FOR
BILL OF PARTICULARS AND (3) TO
STRIKE BILL OF PARTICULARS**

18 CHRISTOPHER BRYAN ABLETT,

19 Defendant.

20 _____/

21

I. INTRODUCTION

22

23 Defendant Christopher Bryan Ablett, charged with murder in aid of racketeering, use and
24 possession of a firearm in a murder and use and possession of a firearm in relation to a crime of
25 violence, again moves to dismiss the indictment, this time for failure to comply with the Court's
26 previous order for a bill of particulars. In the alternative, Ablett moves to require further
27 particularization by the Government and to have paragraphs 1, 3(d) and 5(a)-(k) of the
28 Government's Bill of Particulars stricken as improper indictment amendments. For the reasons
stated below, the motion is denied.

NO. CR 09-00749

ORDER ON DEFENDANT'S MOTIONS

II. BACKGROUND

3 On July 23, 2009, a federal grand jury returned an indictment charging Ablett with three
4 crimes arising from the alleged September 2, 2008 killing of Mark Guardado, the purported
5 President of the San Francisco Chapter of the Hell's Angels. Count One alleges that Ablett
6 murdered Guardado for the purpose of gaining entrance to, maintaining, or increasing his position in
7 the Mongols, an enterprise which allegedly engages in racketeering activity, in violation of 18
8 U.S.C. § 1959, the Violent Crimes in Aid of Racketeering Activity (“VICAR”) statute. Count Two
9 alleges that he used and possessed a firearm in furtherance of committing the murder in Count One,
10 in violation of 18 U.S.C. § 924(j)(1). Count Three alleges that he used a firearm in furtherance of
11 the crime of violence in Count One, in violation of 18 U.S.C. § 924(c)(1)(A).

12 On April 23, 2010, Ablett filed three motions to dismiss the indictment, a motion to stay and
13 a motion for a bill of particulars. On August 3, 2010, The Court denied the motions to dismiss and
14 to stay, and granted in part and denied in part the motion for a bill of particulars. In the August 3
15 Order, the Court required the Government to, (1) “clarify in paragraphs 1 and 4 of the Indictment
16 the time period encompassed within the phrase ‘[a]t all times relevant to this Indictment,’” and (2)
17 “clarify the precise offense or other acts included within the phrase ‘among other things’ in
18 paragraph 1 of the Indictment, within the phrase ‘include, but are not limited to’ in paragraphs 5 and
19 6 of the Indictment, in the word ‘includes’ in paragraph 6(a) of the Indictment, and in the word
20 ‘including’ in paragraphs 6(a) and 7 of the Indictment.” Doc. 54 at 5-6. The Government filed a
21 Bill of Particulars on September 2, 2010, and on October 14, 2010 Ablett filed this motion to
22 dismiss. The parties appeared for oral argument on the motion on November 2, 2010.

III. STANDARD

24 The decision to grant or deny a bill of particulars rests within the trial court's discretion, and
25 is appropriate where an indictment is ambiguous such that a defendant needs clarification in order to
26 prepare a defense. *U.S. v. Long*, 706 F.2d 1044, 1054 (9th Cir. 1983) (citations omitted). “[A bill of
27 particulars] is designed to apprise the defendant of the specific charges being presented to minimize
28 the danger of surprise at trial, to aid in preparation and to protect against double jeopardy.” *Id.* In

1 other words, the purpose of a bill of particulars is to clarify ambiguities in an indictment, not to
 2 serve as a replacement for discovery requests. *Id.*; see also, *United States v. Ryland*, 806 F.2d 941,
 3 942 (9th Cir.1986) (“[a] defendant is not entitled to know all the evidence the government intends to
 4 produce but only the theory of the government's case”); *U.S. v. Giese*, 597 F.2d 1170, 1180-1181
 5 (9th Cir. 1979) (“full discovery obviates the need for a bill of particulars”).

6 After an indictment has been returned, the charges may not be expanded through
 7 amendment, except by a superseding indictment returned by the grand jury. *Russell v. United*
 8 *States*, 369 U.S. 749, 769-771 (1962). “An amendment of the indictment occurs when the charging
 9 terms of the indictment are altered, either literally or in effect, by the prosecutor or a court after the
 10 grand jury has last passed upon them.” *U.S. v. Von Stoll*, 726 F.2d 584, 586 (9th Cir. 1984)
 11 (citations omitted).

IV. DISCUSSION

13 In his motion to dismiss, Ablett argues that the Bill of Particulars fails to clarify the precise
 14 offense or other acts included within the phrase “among other things” in paragraph 1 of the
 15 Indictment, within the phrase “include, but are not limited to” in paragraphs 5 and 6 of the
 16 Indictment, in the word “includes” in paragraph 6(a) of the Indictment, and in the word “including”
 17 in paragraphs 6(a) and 7 of the Indictment, as required by the Court’s August 3 Order. He further
 18 maintains that the Bill of Particulars constructively and impermissibly amends the Indictment by
 19 expanding its time period, the jurisdictional connection to interstate commerce beyond what it
 20 contemplates and the particular racketeering activities beyond those already alleged in paragraph 7.

21 Ablett relies heavily on *United States v. Diaz*, to which the Court referred in the prior Order,
 22 for the proposition that the Government failed to comply with that Order when it simply listed the
 23 type of offenses contemplated by the Indictment. However, while the Court in *Diaz* rejected the
 24 Government’s attempts to use open-ended qualifiers in a Notice of Intent to Seek the Death Penalty,
 25 neither the holding there nor this Court’s August 3 Order requires the Government to provide the
 26 level of detail Ablett requests. See *Diaz*, No. CR 05-00167 WHA 2007 WL 4169973 at *12; see
 27 also Doc. No. 54 at 5-6. Indeed, the August 3 Order simply required the Government to clarify
 28 certain highlighted words and to place boundaries around certain identified open-ended terms, such

1 as “among other others,” that were sufficiently vague to pose a danger of surprise at trial.¹
 2 Additional specifics as to the acts that form the basis of the VICAR charge can be addressed through
 3 discovery. Ablett’s request to dismiss the Indictment or, in the alternative, for a further Bill of
 4 Particulars must therefore be denied.

5 As to the purported amendments to the Indictment, Ablett first argues that the Bill of
 6 Particulars identifies time frames “up through and including the present,” which he maintains go
 7 beyond the period the Grand Jury could have considered (the date of the Indictment). Regardless of
 8 the ongoing time frame, however, the Government will still have to prove at trial that the alleged
 9 VICAR enterprise was in existence on September 2, 2008, the date Ablett allegedly shot and killed
 10 Guardado. Adding the language “up through and including the present” to describe a VICAR
 11 enterprise that the Government contends is still in existence is not an amendment, then, because “the
 12 charging terms of the indictment” are not altered. *Von Stoll*, 726 F.2d at 586. In other words, even
 13 with the additional language, the Bill of Particulars is not an improper amendment because it does
 14 not “substantial[] alter[]” the charging document or what will have to be proven at trial. *Id.*

15 Ablett next argues that the Bill of Particulars improperly expands the Grand Jury’s
 16 determination of the effect of the alleged VICAR enterprise’s conduct on interstate commerce by
 17 adding the italicized language: “Members and associates of the Mongols criminal enterprise traveled
 18 in interstate and foreign commerce to conduct the affairs of the enterprise *and the affairs of the*
 19 *enterprise itself affect interstate and foreign commerce.*” Doc. 57 at 3:18-3:20. As Ablett points
 20 out, paragraph 6(d) of the Indictment included only the non-italicized language. A closer reading of
 21 the Indictment, however, reveals that the Grand Jury contemplated that the affairs of the enterprise
 22 itself would affect interstate commerce because paragraph 3 reads: “The Mongols gang, including
 23 its leadership, its membership, and its associates constituted an ‘enterprise,’ ...that is, a group of
 24 individuals associated in fact, that engaged in, and the activities of which, affected interstate and
 25 foreign commerce.” Doc. 1 at 3. In other words, this added language in the Bill of Particulars

26 ¹ Moreover, although *Diaz* also involved the Government’s use of open-ended qualifiers, it presents
 27 a situation markedly distinguishable from the case here. Not only was the relevant pleading there a
 28 Notice of Intent to Seek the Death Penalty (rather than a bill of particulars, which has a very limited
 purpose), but the defendants were charged with three murders as RICO predicate acts and not solely
 as VICAR offenses. *Diaz*, No. CR 05-00167 WHA 2007 WL 4169973 at *1 (N.D. Cal. Nov. 20,
 2007).

1 makes no substantive change to the Indictment's charging terms and therefore does not represent an
2 improper amendment.

3 Lastly, Ablett argues that the Bill of Particulars amends the Indictment by adding a laundry
4 list of statutory offenses that go beyond those listed in paragraph 7 of the Indictment. Ablett argues
5 that paragraph 7 was not open-ended, that the Government was required to identify the actual
6 murders and narcotics trafficking offenses and that the list of additional statutory violations
7 improperly expands the potential racketeering activity alleged. This is not so. The Court's August
8 3 Order required the Government to clarify the term "including" in paragraph 7 of the Indictment,
9 which the Government does in paragraphs 5(a)-(k) of the Bill of Particulars. As previously stated,
10 the Government is not required to provide in the Indictment or in the Bill of Particulars the degree
11 of specificity as to the illegal conduct forming the predicate VICAR acts that Ablett requests; the
12 relevant specifics as to those acts will be addressed, if deemed appropriate, in the context of the
13 discovery process. Moreover, while this list of predicate offenses indisputably expands the list that
14 was provided in the Indictment, there is no indication that these acts were not considered by the
15 Grand Jury. In other words, paragraphs 5(a)-(k) of the Bill of Particulars do not constitute an
16 amendment because they do not alter the Indictment's charging terms. Therefore, because
17 paragraphs 1, 3(d) and 5(a)-(k) do not impermissibly amend the Indictment, Ablett's request to
18 strike those paragraphs must be denied.

19

20 IV. CONCLUSION

21 For the reasons stated above, Ablett's motion to dismiss is denied. His alternative requests
22 for particularization as well as to strike paragraphs 1, 3(d) and 5(a)-(k) of the Bill of Particulars are
23 also denied.

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1 IT IS SO ORDERED.
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Dated: 12/22/10
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RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE